

WRIT PETITION NO. 356 OF 1991

Comunidade of Chicalim,
by its Attorney
(Procurador), Shri
J.J.S. Rodrigues,
r/o Chicalim, Goa.

.... Petitioner.

Versus

1. Income Tax Officer,
Ward I, Margao,
Goa,
2. Assistant Commissioner
of Income Tax, Margao,
Goa, and
3. Union of India,
(through the Secretary
to the Government of
India, Ministry of
Finance, New Delhi).

.... Respondents.

Shri H. D. Naik, advocate for the petitioner.

Shri V. R. Tamba, advocate for the respondents.

CORAM: V. C. DAGA &
P. V. HARDAS, JJ.

DATE: 11th June, 2002.

ORAL JUDGMENT (Per V. C. Daga, J.)

The present petitioner, the Comunidade of Chicalim, filed this petition to challenge Notice issued under Section 148 of the Income Tax Act, 1961, (the "IT Act" for short), dated 18th March, 1991, bearing No. O.21/W1 (Annexure P.4) and by an interim order further BOI proceedings pursuant to the Notice were stayed.

FACTS IN BRIEF

2. The Income Tax Officer, Ward No.I, Margao, Goa, has issued the above Notice on the grounds that he has a reason to believe that the petitioner's income in the status of body of individuals (BOI) chargeable to tax for the Assessment Year 1986-1987, has escaped assessment, within the meaning of Section 147 of the IT Act and that, therefore, he proposes to re-assess the petitioner's income for the said Assessment Year. He has required the petitioner to deliver to him a return in the prescribed form, of the petitioner's income for the said Assessment Year 1986-1987.

3. The petitioner, after receipt of the aforesaid Notice under Section 148 of the IT Act, by letter dated 19th April, 1991, called upon the respondent no.1, Income Tax Officer, to disclose the reasons, if any, recorded by him before issuing Notice dated 18th March, 1991, proposing to re-open his assessment. The respondent no.1 did not care to communicate reasons for the proposed re-opening, with the result, the petitioner, was required to approach this Court. The petitioner in the petition has contended that Notice has been issued by the Income Tax Officer, Ward I, Margao, Goa, without recording reasons and also without complying with the mandatory basic requirements of Section 147 of the IT

Act. As such the action complained of is without authority of law.

4. On being noticed, the respondents appeared and filed their affidavit in reply, making bald averment therein to the effect that specific reasons for adopting the status of BOI as against AOP are recorded in the order sheet. However, no copy of the order sheet has been produced alongwith the affidavit in reply. No reasons for issuing Notice under Section 148 of the IT Act are to be found in the counter-affidavit. No copy of the reasons alleged to have been recorded is produced on record, inspite of specific assertion made in the petition that no such reasons existed, and/or no reasons were recorded before directing Notice under Section 148 of the IT Act. Apart from the stray averments in the affidavit in reply, no other material has been placed on record in support of Notice under Section 148 of the IT Act.

SUBMISSIONS

5. The learned counsel for the petitioner contended that the Income Tax Officer had no material before him for entertaining belief that income chargeable to tax has escaped to be assessed. In the submission of

the petitioner two conditions precedent are required to be fulfilled before the Income Tax Officer can exercise jurisdiction under Clause (a) of Section 147 of the IT Act. These conditions are:-

(i) He must have reason to believe that the income has escaped assessment; and

(ii) that such escapement is by reason of the omission or failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for his assessment for the relevant year."

The petitioner further submitted that if the existence of these facts is challenged by the assessee before the High Court, it is for the Income Tax Officer to satisfy the Court about the existence of the same by filing an affidavit and producing relevant record. Apart from this, there is nothing in the counter-affidavit filed by the Revenue to suggest that there was failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for relevant Assessment Year 1986-1987. No indication in this behalf is to be found in the affidavit-in-reply. No such case has been made out by the respondents in their counter-affidavit and/or return. The learned counsel for the petitioner thus contended that the first respondent acted beyond jurisdiction conferred on him and Notice under Section 148 of the IT Act is liable to be quashed and set aside.

6. The learned counsel appearing for the petitioner relied on the judgment of the Supreme Court in the case of **Madhya Pradesh Industries Ltd. vs. Income-Tax Officer, Special Investigation Circle 'B', Nagpur**, (1965) 56 ITR 637 and submitted that there is no counter-affidavit filed, as such this Court has to accept the allegations made in the petition and quash the notice which is challenged in the petition. The learned counsel for the petitioner also relied on the judgment of the Division Bench of this Court in the case of **Devji Rajvi Patel vs. Balasubramaniam & Ors.**, 210 (1994) 925, in support of his contention.

7. The learned counsel appearing for the respondents, when called upon to justify the defence, prayed for adjournment so as to produce relevant material before this Court. As a matter of fact, affidavit in reply has been filed on record in the month of June, 2001. It was open for the respondents to produce relevant material alongwith their affidavit. We do not approve this method of producing documents across the Bar. Ample opportunity and time was available to the respondents to produce adequate and relevant material in support of their defence as the petition is pending since 1991. This petition was dismissed by this Court in limine by Order dated 19th November, 1991. The matter was carried to the Apex Court in Civil Appeal No.7314 of

1996. The order of of this Court dismissing the petition in limine, came to be set aside in appeal by Order dated 28th July, 2000. While disposing of the Appeal, the Apex Court specifically directed that the Writ Petition should be decided expeditiously. That is how, today this petition was placed before us for final hearing. This petition came up for final hearing on the second occasion in last 11 years. Thus, considering the pendency of the petition since 1991 and the directions issued by the Apex Court to hear this petition expeditiously, adjournment sought was refused and accordingly we proceeded to hear this matter.

8. Per contra, learned counsel for the Revenue in the above circumstances relied on the counter-affidavit and tried to justify the action of the Income-Tax Officer on merits. Alternatively, he submitted that alternate remedy by way of appeal being available to the petitioner, this Court should not exercise writ jurisdiction under Article 226 of the Constitution of India.

CONSIDERATIONS

9. The petitioner, in this petition, specifically challenged the existence of the conditions

precedent for issuance of the Notice under Section 148 of the IT Act. The law is well-settled on this point that if existence of the conditions precedent for issuance of Notice under Section 148 of the IT Act is challenged by the assessee before the Court on oath, it is for the Income-Tax Officer to satisfy the Court about the existence of the conditions precedent by filing affidavit and/or producing relevant records. If on consideration of the said material, the Court is satisfied that the conditions precedent did exist at the time the Notice was issued, the challenge may be turned down by the Court. In the absence of any material whatsoever placed by the Income-Tax Officer to disprove the challenge of the assessee to the existence of the conditions precedent, the Writ Petition cannot be dismissed. Reference may be made in this connection to the decision of the Supreme Court in the case of **Madhya Pradesh Industries Ltd.** (cited supra). that was a case under Section 34 of the Indian Income-Tax Act 1922 (corresponding to Section 148 of the IT Act). The Notice was challenged by the assessee before the High Court by filing writ petition. The High Court dismissed the Writ Petition in limine. The Apex Court held that upon receipt of the Notice under Section 34 of the Indian Income-Tax Act 1922, a claim is made in a writ petition that the Income-Tax Officer had no power to issue the notice and that the power is exercised not for any legitimate purpose for which it may

be used, but for the purpose of making a fishing enquiry and to review a previous order made in favour of the petitioner, a rule upon the Income-Tax Officer to show cause why the notice should not be set aside and an opportunity to him either to accept or to deny the facts and to set out such other material facts as have a bearing on the question, is at least called for. The Apex Court also observed that when the party claiming relief challenges on oath the existence of the conditions which confer jurisdiction, and sets out facts which may, unless disproved, support his case an order dismissing his petition in limine may not properly be made out.

10. In the present case, the Writ Petition was dismissed in limine. However, the Apex Court was pleased to remand this matter for disposal on merit. As already observed hereinabove, this petition is of 1991. Almost two years have passed after the remand by the Apex Court. The matter was on board for hearing, but no attempt was made to produce on record the reasons for issuing Notice under Section 148 of the IT Act. No material is to be found in the affidavit. The learned counsel appearing for the petitioner submits that in the absence of any material placed by the Revenue in respect of jurisdiction of the Income Tax Officer, this Writ Petition should be allowed. The impugned Notice should be quashed and set aside. Our attention has also been drawn to the decision

of this Court in **Devji Ravji Patel** (cited supra), wherein relying on the above decision in **Madhya Pradesh Industries Ltd.**, (at page 641), this Court held that "neither the contention whether the disclosure made by the assessee was full and true in respect of all material facts necessary for the assessment can be determined in the absence of an affidavit by the Income-Tax Officer, nor the plea that the impugned notice was issued with a collateral object could be rejected without an enquiry."

11. The aforesaid decision squarely applies to the present case as stated above, though affidavit has been filed on record by the Income-Tax Officer denying the allegations, but no material is placed on record to justify the denial.

12. The other contention of the petitioner is that the petitioner had disclosed all material particulars of his income, including his status in the return filed by him. As such there was no failure on his part to disclose fully and truly all material facts necessary for his assessment for the relevant year. In this backdrop, he further submits that there is no averment in the affidavit to assert that the escapement is by reason of the omission or failure on the part of the assessee to make return or to disclose fully or truly, all material facts necessary for his assessment

for the relevant Assessment Year. He, therefore, submits that in the absence of any averment in this behalf in the affidavit, this Court should legitimately presume that no reasons are recorded at least for complying with the second condition precedent required for issuing notice under Section 148 of the IT Act. If the existence of these facts is challenged by the assessee before the Court, it was obligatory on the part of the Income-Tax Officer to satisfy the Court even on the second mandatory requirement of the Section. In our view the submission is well made out. No material is to be found in the affidavit complying with this second mandatory requirement of the Section 148 of the IT Act.

CONCLUSION

13. In view of the above this Court has no option but to quash and set aside the impugned Notice under Section 148 of the IT Act. We, therefore, quash the same.

In the result, this Writ Petition is allowed. Rule is made absolute in terms of prayer Clauses (a) and (b) of the petition, with no order as to costs.

P. V. HARDAS, J.

V. C. DAGA, J.